

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

-----x
UNITED STATES, et al., : Civil Action No.:
: 1:23-cv-108
Plaintiffs, :
versus :
: Friday, September 15, 2023
GOOGLE LLC, : Alexandria, Virginia
: Pages 1-80
Defendant. :
-----x

The above-entitled motions hearing was heard before
the Honorable John F. Anderson, United States Magistrate
Judge. This proceeding commenced at 10:50 a.m.

A P P E A R A N C E S:

FOR THE PLAINTIFFS: GERARD MENE, ESQUIRE
OFFICE OF THE UNITED STATES ATTORNEY
2100 Jamieson Avenue
Alexandria, Virginia 22314
(703) 299-3700

JULIA TARVER WOOD, ESQUIRE
KATHERINE CLEMONS, ESQUIRE
MICHAEL WOLIN, ESQUIRE
UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
450 Fifth Street, NW
Washington, D.C. 20530
(202) 894-4266

TYLER HENRY, ESQUIRE
OFFICE OF THE ATTORNEY GENERAL
OFFICE OF THE SOLICITOR GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7704

A P P E A R A N C E S:

FOR THE DEFENDANT: CRAIG REILLY, ESQUIRE
LAW OFFICE OF CRAIG C. REILLY
209 Madison Street
Suite 501
Alexandria, Virginia 22314
(703) 549-5354

JULIE ELMER, ESQUIRE
CLAIRE LEONARD, ESQUIRE
ANDREW EWALT, ESQUIRE
FRESHFIELDS BRUCKHAUS DERINGER, LLP
700 13th Street, NW
10th Floor
Washington, D.C. 20005
(202) 777-4500

MARTHA GOODMAN, ESQUIRE
ANNELISE CORRIVEAU, ESQUIRE
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, NW
Washington, D.C. 20006
(202) 223-7300

COURT REPORTER: STEPHANIE M. AUSTIN, RPR, CRR
Official Court Reporter
United States District Court
401 Courthouse Square
Alexandria, Virginia 22314
(571) 298-1649
S.AustinReporting@gmail.com

(PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING,
TRANSCRIPT PRODUCED BY COMPUTERIZED TRANSCRIPTION.)

P R O C E E D I N G S

THE DEPUTY CLERK: Calling Civil Action Matter
23-cv-108, United States, et al. versus Google LLC.

MR. MENE: Good morning, Your Honor. Gerard Mene
from the U.S. Attorney's Office.

MS. WOOD: Good morning, Your Honor. Julia Wood
on behalf of the United States. My colleague,
Katherine Clemons, is here as well.

MR. HENRY: Good morning, Your Honor. Tyler Henry
from the Virginia Attorney General's Office here on behalf
of the plaintiff states.

MR. WOLIN: Michael Wolin as well. I'm from the
Antitrust Division on behalf of the United States.

MR. REILLY: Good morning, Your Honor.
Craig Reilly for defendant, Google, together with my
co-counsel, Julie Elmer, Claire Leonard and Andrew Ewalt
from the Freshfields firm. Ms. Ewalt [sic], with the
Court's permission, will address the Court on the motion to
modify. Also with me are Martha Goodman and Annelise
Corriveau from the Paul, Weiss firm. And with the Court's
permission, Ms. Goodman will address the Court on the motion
to compel.

THE COURT: Who is going to be arguing on behalf
of the plaintiff on each of the two motions?

MS. WOOD: Your Honor, I'll be addressing the

1 plaintiffs' motion to modify, and Ms. Clemons will be
2 addressing the motion to compel.

3 THE COURT: All right. I want to take up the
4 motion to compel first, and then we'll deal with the issues
5 having to do with the motion to modify.

6 MS. GOODMAN: Good morning, Your Honor.
7 Martha Goodman from Paul, Weiss for Google.

8 We've brought this motion to compel because we're
9 here at the close of fact discovery, and while the United
10 States has made clear from the outset of the case it's
11 pursuing a claim for damages of some amount of money, we are
12 at the close, and we still don't know what it is.

13 The United States served initial disclosures, as
14 it was required to do under the Court's order, and
15 supplemented it multiple times over the course of fact
16 discovery, and, to date, we still don't have a disclosure
17 that complies with Rule 26. So I can start with that
18 particular issue, Your Honor, and then move through the
19 other --

20 THE COURT: Yeah. I'm going to take it up. I'll
21 do the damages issue first, I'll hear from you, I'll hear
22 from the United States, and then I'll take up the direct
23 purchaser issues on that, and then I guess we'll deal with
24 the final communications issues. So let's do it -- I'll
25 hear from you, I'll hear from them; hear from you, hear from

1 them, and do it that way.

2 MS. GOODMAN: Understood. And when you want to
3 address the damages issues, shall I talk about both initial
4 disclosures and the interrogatories related to that?

5 THE COURT: Correct. And the document request.

6 MS. GOODMAN: Okay.

7 THE COURT: So I understand it, it's the initial
8 disclosures, Interrogatories 4, 9, 14, 17 and Document
9 Request Number 12, and then you've got some follow-on
10 interrogatories that are a part of that.

11 MS. GOODMAN: That's correct.

12 So I think our point is simple on the initial
13 disclosures issue, Your Honor. We don't have a disclosure
14 that complies with Rule 26. It requires a computation of
15 each category of damages and a disclosure of the documents
16 or other evidentiary material on which each computation is
17 based. We have simply a disclosure that says the United
18 States spent \$300 million on open web display advertising.

19 THE COURT: Isn't that the same as what you've
20 asked for in Interrogatory Number 9?

21 MS. GOODMAN: It is, Your Honor. It is.

22 THE COURT: Why don't we just focus on the
23 interrogatories then.

24 MS. GOODMAN: Okay.

25 THE COURT: You get it signed under oath. It's

1 much better than an initial disclosure. If you want the
2 information, you should follow up. You've followed up with
3 an interrogatory, you haven't gotten, as you claim, a direct
4 response to the interrogatory. Okay. So let's talk about
5 the interrogatories.

6 MS. GOODMAN: Okay. So Interrogatory 9, as Your
7 Honor notes, requests a computation of damages. We
8 appreciate that their expert is performing that calculation
9 and is working on that now, and we understand, from other
10 communications we've had with respect to data they are
11 seeking from us in order to, to use a euphemism, tie it up
12 in a bow, they have done substantial work to provide some
13 kind of computation of damages. And while we don't -- are
14 not seeking their expert work in this motion, we are asking
15 for some basics about what their damages computations are
16 going to be based on.

17 Is it, for example, on purchases of open web
18 display advertising from Google? Or from a third-party
19 vendor that also bids into a Google Ad Exchange, for
20 example? Is it based on a take rate? Take rate's applied
21 throughout the advertising tech stack as something that the
22 FAAs ultimately paid under their theory. We don't know
23 which one it is.

24 In a patent case, you would know from the
25 beginning, is somebody pursuing a reasonable royalty? Is

1 somebody pursuing lost profits? You would have some
2 understanding of their --

3 THE COURT: You wouldn't necessarily know that at
4 the beginning. That can change during the course of the
5 case. They can make a decision to go one way or the other.

6 MS. GOODMAN: Yes, it can.

7 And we are now five months through fact discovery.

8 THE COURT: Well, officially, fact discovery is
9 over.

10 MS. GOODMAN: That's right.

11 And we don't have information available that --
12 from our point of view, we are in the same position that we
13 were at the beginning of the case. So that's
14 Interrogatory 9.

15 Interrogatories 4 and 17 ask us -- ask the United
16 States to identify the transactions or purchases that
17 underlie their claim of damages. We're not asking for some
18 kind of forensic accounting or tracing of that money through
19 payments to Google or through various other intermediaries;
20 we're just asking for a simple understanding of what
21 transactions are at issue. And while we waited for the
22 United States to supplement interrogatory responses here,
23 they did so under Rule 33(d), as they're permitted to do,
24 but they haven't satisfied their showing of showing that it
25 is any more burdensome for them to identify the transactions

1 than it is for us.

2 And I have spent many hours looking at those
3 invoices, Your Honor. There are invoices for purchases of
4 radio ads, invoices for purchases in local newspapers,
5 invoices for purchases of social media influencer content.
6 That is not what is at issue in this case. What is at
7 issue, to our understanding at least, is purchases of open
8 web display advertising using Google ad tech tools, and I
9 cannot look at those invoices and understand which
10 transactions or purchases are at issue. So their supplement
11 does not comply with Rule 33(d). So that is 4 and 17.

12 And I'll go to 14 now, which ties a bit into the
13 direct purchaser issue, but where we asked for the plaintiff
14 to identify all purchases of open web display advertising
15 directly from Google. And the answer we've received, and
16 which we asked for a supplement, I believe five times, was
17 that the federal agency advertisers pay fees for ad tech
18 services provided by Google that facilitate purchases of
19 open web display advertising from publishers. That is not
20 an answer to the question posed. If the answer is there are
21 no direct purchases, they need to so state in a verified
22 response.

23 THE COURT: Well, I'll probably deal with that
24 more in the second argument.

25 MS. GOODMAN: Okay.

1 THE COURT: But I don't quite understand why that
2 doesn't tell you what you need to know.

3 MS. GOODMAN: Do you want me to address that now
4 or wait until --

5 THE COURT: Well, we'll deal with that in that
6 direct purchaser portion.

7 MS. GOODMAN: Okay. And then finally with respect
8 to Interrogatories 22 through 29, we served these, Your
9 Honor, you know, within the time permitted for fact
10 discovery, and we received responses on September 8th.

11 I read the government's responses when they came
12 in, I read their motion when it came in, and their position
13 that their answers do not -- are sufficient, I don't agree
14 with. And with Your Honor's indulgence, I would -- we moved
15 on the objections, we now have the responses, we think it is
16 efficient to address the responses here. But of course if
17 Your Honor would prefer us to meet and confer, we can do
18 that.

19 THE COURT: And that -- I mean, honestly, my plan,
20 unless you or the plaintiff can convince me otherwise, is
21 for those that were served and you just got the responses
22 this week, to defer ruling on that, to have you do a
23 good-faith consultation based on the responses that you've
24 got, and my rulings on some issues relating to matters that
25 are somewhat similar to the requests in those request for

1 admissions and interrogatories. So let's hold off on any
2 arguments on the Interrogatories 22 through 29 at this
3 point.

4 MS. GOODMAN: Understood, Your Honor. And I think
5 your approach makes a lot of sense.

6 THE COURT: Talk about the document requests,
7 though, Number 12.

8 MS. GOODMAN: Yeah. So we heard from the United
9 States at the beginning of fact discovery that their -- the
10 ad agencies do not maintain structure data or, you know,
11 large spreadsheets or databases of data in the ordinary
12 course, with the exception of the Army, where they told us
13 in somewhat general terms that they have a contractual right
14 from their ad agency to get data. And then we waited for
15 that data, we looked for it in productions, we didn't see
16 it, and of course in the flurry of fact discovery, we
17 waited, we continued to wait and then received a letter on
18 August 7th, I believe, saying that they couldn't produce the
19 data in time, and then they also served RFP 76 for Google's
20 data.

21 We took them at their word in that letter and did
22 not pursue it further at that time; however, when we took
23 the deposition of the ad agency that works with the Army,
24 Omnicom -- actually, it's one of their subsidiaries works
25 with the Army -- that witness explained to us that they had

1 multiple conversations with the Department of Justice about
2 this data that the United States claims to own and have a
3 contractual right to obtain.

4 And now we are learning for the first time in
5 their papers that there was a proposal for a contract
6 modification, that the proposal -- that the data would not
7 come in in time from Army, and that the United States made a
8 unilateral determination that it was unduly burdensome to
9 obtain the data that appears to be responsive to RFP 12.

10 THE COURT: So what do we do? I mean, I know you
11 made a lot of argument about that. So what are you asking
12 me to do?

13 MS. GOODMAN: I'm asking the Court to compel
14 production of the data that they have a contractual right to
15 obtain from their ad agency. Because that data is relevant,
16 not only to damages, but also relevant to the relevant
17 market determination about how the Army -- who is sort of
18 FAA Number 1, if you will, the only FAA mentioned in the
19 complaint. How they spend their advertising dollars is
20 highly relevant to the relevant market determination, and
21 our experts can use that data to analyze shifting of spend
22 across different channels, for example, for the relevant
23 market analysis, as well as trying to understand the claims
24 for damages. It's highly relevant data.

25 Finally, on RFP 12 with respect to the Wavemaker

1 data, as I'm calling it, which we understood to be something
2 that the ad agency for the Postal Service has provided to
3 DOJ, we don't have that data. We asked for it multiple
4 times; we did not receive a response.

5 I appreciate the United States' position and Your
6 Honor's rulings last week with respect to communications as
7 part of the attorneys' work product, but the underlying
8 data, which is at issue, is not protected work product as we
9 understood Your Honor's ruling.

10 THE COURT: Okay. All right. Okay. I'll hear
11 from the government now.

12 MS. CLEMONS: Thank you, Your Honor. This is --
13 United States' discovery responses with respect to damages
14 are -- satisfy the Federal Rules standards.

15 THE COURT: How? How do they do that? Tell me
16 the amount of damages that the government is seeking in this
17 case. Fact discovery is over, and you need to tell me, and
18 you need to tell the defendant in this case how much money
19 the government is seeking in this case and what -- how you
20 compute those damages. I haven't seen a single number in
21 all your answers to interrogatories. Initial, supplement,
22 supplement, supplement, not a single number.

23 So tell me how that complies with the Federal
24 Rules of Civil Procedure.

25 MS. CLEMONS: There are a few reasons, Your Honor.

1 First, fact discovery, while it -- the fact discovery
2 deadline passed, Google requested additional time to produce
3 data relevant to --

4 THE COURT: Well, this is your damages.

5 MS. CLEMONS: Yes.

6 THE COURT: Okay. So, in a typical case, a
7 plaintiff doesn't need to get information from someone else
8 to determine what their damages are. If you buy something,
9 you pay for it, you know what you paid for it, you know what
10 you bought.

11 You're trying to tell me now that none of your
12 plaintiffs in this case know what they bought, how much they
13 paid for it and what it was, and so you can't compute your
14 damages? Is that the government's position?

15 MS. CLEMONS: We're working to compute the
16 damages, Your Honor, but this is not a typical case. This
17 is a case in which you had the monopolist that owns the buy
18 side, the exchange in the middle, and the sell side and --

19 THE COURT: You buy -- you say you bought
20 something.

21 MS. CLEMONS: Yes.

22 THE COURT: What did you buy, and how much did you
23 pay for it?

24 MS. CLEMONS: So the -- that is why, Your Honor,
25 the United States disclosed the amount of open web display

1 advertising.

2 THE COURT: Okay. So that's --

3 MS. CLEMONS: But the fees --

4 THE COURT: I assume that's one component of what
5 it is that you're now seeking. Apparently you've only --
6 you know, that was what you said in your initial
7 disclosures, 300 million for, you know, open display, and
8 that's the only number that the United States has provided
9 to the defendant in this case throughout this discovery.

10 MS. CLEMONS: Because, Your Honor, the defendant
11 in this case is in the unique position of being the only
12 party, the only entity to know for sure where it took money
13 out of the FAA's bids into its own exchange and into its --
14 into its tools. Right.

15 THE COURT: Well, you know how much you paid or
16 paid through someone, you know how much you paid to your
17 advertising agencies for certain services; right?

18 MS. CLEMONS: We know how much we paid for media,
19 Your Honor.

20 THE COURT: Okay. Have you --

21 MS. CLEMONS: But as the Omnicom designee
22 testified during that 30(b)(6) deposition, there are a lack
23 of transparency into what Google is charging with respect to
24 purchases made through its Ad Exchange.

25 This is a situation in which Google is the record.

1 Right. This is not a situation in which plaintiffs uniquely
2 have access to the information about how much plaintiffs
3 were overcharged for those services. This is a situation in
4 which you have a company, because of their monopoly, because
5 of their unique access on all sides of the transaction, can
6 take money for individual transactions that may vary from
7 transaction to transaction, and the only actual record, at
8 least with respect to AdX, of exactly how much was taken out
9 and how much that would have been overcharged compared to a
10 but-for market, but-for world, is Google. Right. And --

11 THE COURT: No, that's not right.

12 MS. CLEMONS: It is, though, Your Honor, because
13 the entire -- the way that Google takes its fees for the Ad
14 Exchange is by pulling them from the bid of the advertiser
15 before they then pay out a smaller portion of that to the
16 publisher. And there's not an invoice for that. Right. It
17 all gets wrapped up into the total cost of the media. And
18 that lack of transparency is stated in the complaint; this
19 is not news to Google. Neither is it news to Google that we
20 are claiming damages based on the purchase of ad tech
21 services and not the purchase of advertising inventory from
22 the --

23 THE COURT: Why didn't you put that in your
24 initial disclosures then? You didn't say that in your
25 initial disclosures; did you?

1 MS. CLEMONS: Your Honor, the information
2 available to us at the time in the initial disclosures is
3 the amount that we paid in total, including the ad tech
4 services. Right. Where the money -- the ad tech services,
5 Google pulls the money out of the amount for the media.

6 In total, the FAA spent \$300 million on this type
7 of advertising. Google knows which purchases went through
8 Google pipes. And it is something that the United States
9 needed to discover and is continuing to need to discover
10 exactly which transactions on which -- at which times went
11 through which Google pipes and had how much taken out of
12 them. And that is why there is a need for complex expert
13 calculations in order to come up with a total.

14 It's clear in the complaint that we are seeking
15 damages for overcharge based on the take rates. That was
16 clear as well in the opposition to the motion to dismiss.
17 None of this is news to Google. It's -- but it is
18 information uniquely held by Google that has been very
19 difficult to get from them. So we have provided what we
20 have, which is the invoices for the media.

21 In addition, Google's complaints about the breadth
22 of the documents, the invoices being provided goes to
23 Interrogatory Number 17, which is not that Google is saying
24 now this is the only reason they needed it is in order to
25 look at Google purchases. Right. It is not limited to an

1 open web display advertising purchase through Google tools.
2 It is a very broad interrogatory that asks for all ad spend
3 through an ad agency. And so they have received all of the
4 records that we have on ad spend through the ad agency.

5 We've separately been seeking discovery from third
6 parties, all of the ad agencies and from Google and from
7 other ad tech providers that were involved in purchases that
8 the FAAs made through Google pipes, but it's a lot of
9 information.

10 With respect to the Army data that --

11 THE COURT: Well, let's go back to 17. You just
12 said 17 was -- for each campaign identified in response to
13 Interrogatory Number 15, identify all amounts paid by the
14 federal agency advertiser to Google or by the federal agency
15 advertiser to any agency in connection with the campaign.

16 MS. CLEMONS: Yes, Your Honor.

17 THE COURT: So have you identified those specific
18 documents that relate to the campaigns identified in
19 Number 15 in your response to this interrogatory?

20 MS. CLEMONS: Yes, Your Honor.

21 THE COURT: I mean specific documents; not all
22 documents with large Bates ranges.

23 MS. CLEMONS: Yes. And it is a large number of
24 documents because it is the monthly invoices for each
25 campaign. Right. It is the backup invoices that go with

1 those. But that is the record. Unfortunately, the FAAs
2 don't have a perfect database from which they can pull this
3 kind of information out in a neat form like Google might be
4 looking for. But the record of the payments made and for
5 what, right, is in those documents. We've also provided
6 financial data that those invoices were paid by the FAAs.

7 We've explained to Google from the very beginning
8 that we lack this information. And the information that
9 Google has been retained, right, to be the -- to use their
10 campaign manager product and to use their ad tech purchasing
11 tools in part so that they had -- they had the information
12 regarding those purchases. They facilitated those
13 purchases.

14 THE COURT: It's the plaintiffs' burden to
15 establish damages. You understand that; right?

16 MS. CLEMONS: I do, Your Honor.

17 THE COURT: All right. And you understand that
18 burden starts at the beginning of the discovery and can't
19 just wait until the time period that you're going to serve
20 your expert reports. You can supplement information, but
21 when initial disclosures are required, when answers to
22 interrogatories are required, you need to provide the
23 information that you currently have available that is
24 responsive or required under the initial disclosures or the
25 interrogatories.

1 MS. CLEMONS: Yes, Your Honor. And we have
2 provided, and we continue to provide information. We are
3 still waiting on information from Google in order to
4 supplement that. We've pointed in the interrogatory
5 responses that we served last week.

6 THE COURT: What specific information have you
7 provided to them?

8 MS. CLEMONS: We have provided a record of all of
9 the invoices that we can find. We have sought from third
10 parties, from the ad agencies, records that they have.
11 We've pointed -- in response to certain interrogatories,
12 we've pointed Google to its own documents to show where
13 there is information that we are pulling some of this
14 information from.

15 THE COURT: And how does that comply with any
16 computation of damages?

17 MS. CLEMONS: The computation -- the problem is,
18 the computation cannot be done until we have the information
19 about all of the different purchases, and we've been seeking
20 that information. We can provide them information that --
21 the information that we were using to compute those damages,
22 but they already have it, Your Honor.

23 Google is trying to argue that they have no idea
24 what our -- what our claims are, what our damages claims
25 are, but they were alleged in the complaint, they were

1 argued in the motion to dismiss. We've pointed them out in
2 response to interrogatories which purchases through which
3 tools are the subject of our claims.

4 And so it's difficult because the United States is
5 not in a position until it has all the information from the
6 systems through which we made those purchases and the
7 amounts that were pulled out of those purchases and put into
8 Google's pocket. It's not possible to say exactly how much
9 the overcharge was until we have the information from which
10 you can calculate that overcharge.

11 We do, however, have evidence -- might have
12 provided evidence and have put forward from the complaint
13 until now evidence and information regarding the reason that
14 we are alleging that it was overcharged, which has to do
15 with all of the evidence going to Google's monopolization of
16 these markets. And that -- the evidence that we have
17 regarding whether Google is a monopolist in a position to
18 charge more than it would in a competitive market, that
19 information is something that we've also provided to Google.
20 But the specific computation is something that is still a
21 work in progress, in part because we are waiting on
22 information that Google asked for extra time to provide.

23 THE COURT: What are you going to do with that
24 information? I mean, you haven't even told them what you're
25 going to do. If they say it's X dollars, what happens then?

1 You haven't told them how you intend to compute your damages
2 once you get this information you said you've got to get
3 from Google that your own clients don't know.

4 MS. CLEMONS: The damages calculation will then
5 derive from the economic model being worked on by other
6 experts.

7 THE COURT: Too late. I mean, you know ...

8 MS. CLEMONS: In a complex antitrust case, Your
9 Honor -- I mean, this is not a situation in which there is
10 a -- some overcharge that can be pointed to that's written
11 out in a document. This is not a situation in which we have
12 a bill for a medical claim in a personal injury case, for
13 example.

14 This is a situation in which the allegations are
15 that a monopolist charged super competitive prices, and the
16 only way to calculate how much those were -- those prices
17 were overcharged is through economic modeling. That's why
18 the Court agreed -- or presumably that's why the Court
19 agreed to have a separate expert discovery period. Right.
20 Fact discovery is not yet closed because Google has asked
21 for additional time with respect to the data, and expert
22 discovery is part of discovery and a necessary part of
23 discovery in an antitrust case where this level of
24 complexity is involved.

25 The damages, the information, the key to all of

1 the specific overcharges, it lives in Google's systems. And
2 while it is reflected in some documents that we have
3 obtained from third parties and that were sent to FAAs in
4 the ordinary course of business, the best and certainly most
5 convenient way to see all of those is with respect to
6 Google's systems. And the lack of transparency as to
7 exactly what they've charged with respect to its specific
8 transactions and what they bid in specific -- what was bid
9 in specific transactions on behalf of the FAAs is part of
10 the reason that we are bringing the claims in the way that
11 we are bringing them. That lack of transparency is the
12 same -- the same issue that is making it difficult for us to
13 calculate damages.

14 So without that information and without an
15 economic model that is complete, we would just be guessing
16 as to what the exact percentage of overcharges is, or a
17 range of the percentage of overcharge.

18 THE COURT: Why haven't you given them the
19 documents that you have in your possession that relate to
20 your damages claims?

21 MS. CLEMONS: We have, Your Honor.

22 THE COURT: Okay. You've given them the raw data
23 that you got from Wave whatever?

24 MS. CLEMONS: So with respect to the Wavemaker
25 data, Your Honor, it's not voluminous data. Right. This is

1 part of what Your Honor ruled on last week, which is that --

2 THE COURT: Yes or no --

3 MS. CLEMONS: -- there was a very specific
4 request.

5 THE COURT: -- have you given them that raw data?

6 MS. CLEMONS: No, because it's work product.

7 THE COURT: Have you given your experts that raw
8 data?

9 MS. CLEMONS: No, because it's work product, Your
10 Honor.

11 THE COURT: Well --

12 MS. CLEMONS: It was for the purposes of
13 determining whether and how the claims should be brought on
14 behalf of Navy.

15 THE COURT: All right. I want that data delivered
16 to my chambers before the end of the day today. I'll look
17 at it and see whether that raw data should be produced;
18 okay?

19 MS. CLEMONS: Okay. To be clear, Your Honor, it
20 is not raw data. It is -- my understanding --

21 THE COURT: I'll see what it is --

22 MS. CLEMONS: It's a request from counsel.

23 THE COURT: -- and I'll make a determination.

24 MS. CLEMONS: Okay.

25 THE COURT: I thought I was clear in my ruling.

1 And, you know, I've got to tell you, the
2 government's claim for damages is in jeopardy in this case
3 given their lack of responsiveness in discovery. And, you
4 know, I want you to understand the seriousness of the way
5 that I'm concerned about your responses to these
6 damages-related questions.

7 A defendant in any case is entitled to know what
8 the plaintiff is asking for and how they need to supplement
9 it at a later time, but at least needs to know, in some
10 respects, as to how the damages are being calculated, what
11 the elements are, what you intend to be going after, and
12 it's not going to come in an expert report and they then
13 have 30 days from when they get your expert report to get
14 their expert, to get everything lined up, to know how to
15 respond to that. It's not fair. And I want to make sure
16 this case is tried on a fair basis, and hiding the ball as
17 to how you're going to calculate the damages or what the
18 damages are, you know, what the elements are going to be,
19 you know, if the model isn't complete, the model isn't
20 complete. But you need to explain to them that you're
21 working on a model that's going to be doing X, Y and Z, and
22 that when you get the information, this is going to be it,
23 and you can supplement it at a later time. But the idea
24 that you're going to wait until an expert report gets served
25 to tell them what you're seeking in this case and how it's

1 calculated and how it all came out isn't fair.

2 So I'm going to require you to provide
3 supplemental responses to Interrogatories 4, 9, 14, 17.
4 I'll look at this expert data. I assume what you have
5 provided to the government -- or provided to the defendant,
6 I'm going to say, if you have not provided them that
7 information as of the close of discovery, you cannot use it.
8 Is that fair or not fair?

9 MS. CLEMONS: Absolutely fair, Your Honor, and we
10 don't intend to use it because it was an initial
11 determination for very specific information requested by
12 counsel to assess claims, and then we sought actual
13 discovery.

14 THE COURT: I'm talking about in broad range. If
15 you haven't provided them with the documents upon which you
16 rely to support your claim for damages in this case, you're
17 not going to be able to use it.

18 MS. CLEMONS: Yes, Your Honor.

19 THE COURT: Other than --

20 MS. CLEMONS: We completely agree.

21 THE COURT: -- information that you're getting
22 from Google. I'll carve that out, obviously.

23 But, I mean, it's only fair that in the fact
24 discovery part of this case that you provide them with the
25 information that you intend to rely upon in order to claim

1 your damages.

2 MS. CLEMONS: Understood, Your Honor. And we
3 have. And when we get it back from Google, we'll give it
4 back to them if that's what needs to happen. But we are in
5 a situation where, you know, the defendant is the entity
6 that was retained to conduct these transactions and has the
7 information we need in order to prove the details of those
8 transactions.

9 THE COURT: But you were the buyer of those
10 transactions; you're the one who paid the -- you know, you
11 or the -- you paid a check to the advertising agencies who
12 then passed the check on to Google or whatever.

13 MS. CLEMONS: Yes.

14 THE COURT: So you know how much you paid. You
15 know whether it was for radio advertising -- or you should
16 know whether it was for radio advertising or for other kinds
17 of advertising. You shouldn't, you know, be including that
18 kind of information in your damages analysis. You need to
19 tell them how you're going to break the information out,
20 what you intend to do with it. You know, if the computation
21 isn't done yet, it isn't done yet, but you need to provide
22 them with some basic information about what the claims are,
23 what it is you're going to be asking for and how you intend
24 to develop that information.

25 MS. CLEMONS: Understood, Your Honor. And we will

1 provide additional information.

2 THE COURT: Okay.

3 MS. CLEMONS: With respect to the Army -- the Army
4 data, we did provide the contract modification documents
5 last week. We provided the sample data that was provided by
6 Army's ad agency. Google will see that it -- the only thing
7 it will tell them is what fields are available in Google's
8 own products, whether it be DV360 and Campaign Manager.

9 So to the extent that we know, or we can know what
10 was paid for each different kind of advertising on what
11 dates through what systems, it is Google that is the source
12 of that information, even in the ordinary course of
13 business.

14 THE COURT: Well, maybe I misunderstood what was
15 in the briefs about the Army situation, that the agency had
16 the opportunity to get specific information and they
17 declined that opportunity. Is that right or wrong?

18 MS. CLEMONS: So Army had the opportunity to get
19 specific information. We kept Google apprised throughout
20 the process, May 9th, June 9th, August, that we were trying
21 to get it through the government contracting process,
22 because while Army may own the data and can say what may or
23 may not be done with it, Army does not have a right to just
24 obtain the data for free. Right. It is held by someone
25 else, and if that's not a contract deliverable, then that's

27

1 not something that Army can just say give us this today. It
2 has to be done through the government procurement process.

3 So we went through that process, and the proposal
4 came back from the contractor that it was going to not --
5 they were not going to be able to pull the data until eight
6 weeks later, nine weeks later, which was past the end of
7 fact discovery. And in light of that and in light of the
8 fact that the data that they were pulling was data from
9 DV360 and Campaign Manager, two Google products, that we
10 would only end up with Google data through all of that time
11 period.

12 So I think if it's not clear, Your Honor, it
13 should be clear that this is not a fairness issue. Google
14 has the data right now to look at which FAA purchases were
15 which and when and for what products and through what
16 systems. That's the data that we're trying to get. So
17 they've been sitting on that data for much longer than we
18 will have it by the time we get it.

19 THE COURT: Okay. Well, within two weeks, I want
20 you to provide supplemental responses to Interrogatories 4,
21 9, 14 and 17. I do want to look at this document that we've
22 talked about or report or whatever it is, and I'll see
23 whether that's something that, based on my earlier rulings,
24 whether the format in which it is is a way that can be
25 severed from raw data versus protected information, make a

1 determination on that.

2 But to the extent that you have documents and have
3 not provided them -- and this is as of the close of
4 discovery and didn't provide them to Google -- you're not
5 going to be able to use them in your damages analysis. You
6 know, just ...

7 MS. CLEMONS: Understood. And we absolutely, Your
8 Honor.

9 THE COURT: All right. Thank you. So that deals
10 with the damages issue.

11 Let me take up the direct purchaser issue now.

12 MS. GOODMAN: Martha Goodman, Your Honor.

13 Obviously a very important issue in this case is
14 whether the United States is a direct purchaser under
15 *Illinois Brick*, and that is a legal question to be sure, but
16 there are a variety of facts that we can develop in
17 discovery in order to make -- and take those facts and apply
18 it to the law and then, of course, Judge Brinkema will
19 decide the question of whether the United States is a direct
20 purchaser.

21 THE COURT: But what fact it is that really -- and
22 I understand some frustration in reading their responses.
23 There are a lot of words, and then they get down to the real
24 point. The real point that they say consistently, I think,
25 and hear is that the agencies purchase the advertising from

1 Google on the agency's behalf, and the agencies then
2 reimburse the -- the agency then reimburses the advertising
3 agencies for those purchases.

4 Isn't that what you really need to know, and
5 that's what they say in these responses? That the agencies
6 themselves use advertising agencies to purchase this, they
7 purchase it, and they pay the advertising agencies; they
8 don't pay Google?

9 MS. GOODMAN: That is -- if Your Honor's -- if
10 what Your Honor just recited was consistent and clear across
11 all of these discovery requests, I think I would agree with
12 you that we would have the answers we need.

13 But, for example, in the responses to RFAs 4
14 through 12, they've now denied questions about whether they
15 are direct -- whether there is a direct transaction between
16 Google and the FAA, which is, in my view, inconsistent with
17 what Your Honor just recited.

18 If somebody is buying on behalf of another party,
19 that's not a direct transaction, and that is also an
20 important fact in the *Illinois Brick* analysis and whether
21 any exceptions to it are met. But what Your Honor has said
22 is not consistent across their interrogatory or RFA
23 responses.

24 THE COURT: Well, the fact -- and, again, you
25 know, this issue is getting lawyered to death, and, I

1 mean -- and I don't mean that in a positive manner.

2 You know, the fact is -- and I don't -- I'm
3 assuming from the responses or my common sense reading of
4 the responses is that the agencies themselves have
5 advertising agencies that they contract with to obtain
6 advertisements and other services from those advertising
7 agencies. Those advertising agencies then, on behalf of the
8 government agencies, do certain things. That the agencies
9 themselves don't make payments, don't have contracts, don't
10 have relationships with Google, but their advertising
11 agencies do.

12 And, I mean, I think a fair reading of their
13 responses -- and, again, there are some that are a little
14 more squirrely where they talk about we directly pay Google,
15 which I think is, you know, inconsistent with the broad
16 range of what they keep saying is that they pay the
17 advertising agencies who then pay the agencies on behalf --
18 so -- but, you know, when this issue gets presented to
19 Judge Brinkema, she will know the facts and circumstances of
20 that issue. And, you know, you'll have to argue, you know,
21 the -- what are the consequences of that, whether it does or
22 doesn't fall under, you know, *Illinois Brick* or whether they
23 are or not direct purchasers.

24 But what -- I'm just trying to get to the point of
25 what is it that is really in dispute about the direct

1 purchaser issue?

2 MS. GOODMAN: From our point of view and
3 consistent with what Your Honor just said, we think what you
4 said is correct. But because of these squirrely answers,
5 because of these equivocal answers, because of the
6 prevaricating that is going on in the answers, we are being
7 hamstrung in having a record that is not what should be a
8 very simple issue to present to Judge Brinkema on summary
9 judgment from our point of view.

10 How are these transactions completed? How is
11 Google paid? Through what agencies? Through what mediums?
12 Through what intermediaries? Those facts, which our
13 interrogatories seek to discover, and in which our RFAs are
14 sought to narrow for trial, do not provide the answer
15 that -- are not responsive to the questions as posed and are
16 seeking to get around what is a very significant legal issue
17 and problem in the government's case in order for us to keep
18 kind of playing Whac-A-Mole about how they are attempting to
19 prove that they are a direct purchaser and providing answers
20 that try to -- that are frankly, as you said, overlawyered
21 and are not clear and concise and clear to the questions as
22 posed and are evasive, and that is why these responses that
23 we have received should be supplemented.

24 Particularly with respect to the RFAs, I would
25 direct Your Honor to a case we cited in our reply brief

1 filed yesterday, *KQC [sic] v. Kia* -- I think I messed up the
2 first initials there -- but that case makes very clear and
3 cites a variety of cases from across the country, district
4 courts across the country that show you cannot answer RFAs
5 subject to these objections without -- because we are left
6 in no clear position as to whether they have admitted or
7 denied part of or all of the RFA when you answer subject to
8 objections, which they have done on all of the RFAs at
9 issue.

10 And for the same reason that we seek supplemental
11 responses to our Phase 1 through 3, we think 4 through 12
12 are also ripe for your Court's determination and
13 consideration now.

14 And I think Your Honor made a very good point that
15 with respect to the prevaricating we're seeing in these
16 responses, there are places where they say that they did buy
17 things directly. If that is true, I would like to know what
18 those transactions are so that we can examine them and look
19 at them. Because if they're right about that -- and we
20 don't know because our data, despite what Ms. Clemons said,
21 it is not perfect data, and it is completely -- is dependent
22 on multiple iterations of humans putting together
23 information from which we can then pull data out of our
24 system. So we do not have -- we are not the source of truth
25 for their damages claims. And, for example, the Army is the

1 source of truth for their damages claims because it is the
2 ad agency who knows all of the accounts that they use to
3 purchase advertising on behalf of the Army. Google cannot
4 do that, cannot figure that out on our own with any
5 perfection, but the Army can.

6 And with respect to Interrogatory 14 -- which I
7 appreciate Your Honor has ordered the government to
8 supplement -- again, if there are direct purchases, please
9 identify them; if there are not, so state.

10 THE COURT: Okay. All right. Let me hear from
11 Ms. Clemons.

12 MS. GOODMAN: Thank you.

13 THE COURT: So the statement that the FAA's
14 practice is for the FAA's agencies to pay Google for any
15 advertising purchased on the FAA's behalf and for the FAA to
16 fully reimburse the FAA agencies for those purchases. That
17 is a true and accurate statement?

18 MS. CLEMONS: Yes, Your Honor.

19 THE COURT: And why is that being made subject to
20 any objections?

21 MS. CLEMONS: Because the --

22 THE COURT: I mean, that's your language; right?

23 MS. CLEMONS: It is, Your Honor. The term -- the
24 question -- the RFA that that's in response to is basically
25 simply asking for a naked legal conclusion. Right. The

1 number of times that counsel just stood up and said buy
2 directly, purchase directly, if they do purchase directly,
3 we want to know what that is.

4 The question of whether a purchase is a direct
5 purchase under antitrust laws, which is what is an issue
6 that goes to antitrust standing, it is a core legal issue in
7 this particular case. The question of whether something is
8 a direct purchase is a highly factual analysis that -- where
9 the fact is not whether it's a direct purchase; the fact is
10 all of the different facts and circumstances that go into
11 the purchase. And so it's in response -- there's a couple
12 of reasons. It's in response to a request for whether there
13 are direct purchases. Right. Which is, itself, a legal
14 conclusion, and, therefore, requires more explanation. We
15 also have this issue where there is conflation of ad tech
16 services and the actual inventory purchased through those ad
17 tech services.

18 As is stated throughout our complaint, the
19 inventory at issue, the open web display advertising
20 purchased pragmatically in this case is all purchased
21 through Google. Right. That's the whole point of these ad
22 tech tools is that they allow an advertiser and publisher to
23 be matched up algorithmically. Right. And so whether we
24 purchase open web display advertising directly is a very
25 separate issue from whether we purchase ad tech services

1 from Google directly under *Illinois Brick*.

2 THE COURT: Well, the advertising agencies are the
3 only ones involved. Is that -- I mean, the -- the agency
4 itself uses the advertising agencies for all of its
5 advertising purposes; right?

6 I'm trying to understand why you're trying to make
7 a difference as to payment source, let's just say that. I
8 mean, to the extent that Google is benefited through any
9 practices that you're complaining of here, the money that
10 they received on behalf of the agencies came through the
11 advertising agencies and not from a check from the agency;
12 is that --

13 MS. CLEMONS: Yes, Your Honor.

14 THE COURT: Okay. So why are you trying to make
15 that distinction as far as when they ask about who paid for
16 or, you know, were any payments made. The payments were all
17 made by the advertising agencies.

18 MS. CLEMONS: Presumably the payments were made by
19 the advertising agencies' banks, Your Honor. Right. This
20 becomes more complicated. The question of who ultimately
21 paid, who purchased, those are questions that go to the
22 *Illinois Brick* analysis. You know, where the money came
23 from, it all affects that question.

24 Google wants this to be very clean. They want us
25 to say, no, we didn't make any direct purchases, and then

1 the whole situation goes away. But it's already been
2 determined by Judge Brinkema that this is a complex factual
3 situation. She asked them to look into the facts
4 surrounding whether and how intermediaries might be used.

5 THE COURT: Right.

6 MS. CLEMONS: Knowing that the federal agencies
7 use ad agencies, that was still Judge Brinkema's ruling.

8 And so this isn't a simple issue. This isn't
9 something that will go away with an RFA. This is a complex
10 issue involving a lot of facts that is -- that is more
11 complicated than did you directly purchase; yes or no.

12 THE COURT: I know it's very complicated, but the
13 core fact isn't that complicated, and you're trying to make
14 it more complicated than it needs to be, I think, or trying
15 to cloud it up.

16 Whether the fact that the agencies use advertising
17 agencies is an impediment to you getting damages is a legal
18 issue. But, you know, I think you need to acknowledge that
19 your -- that your agencies use advertising agencies to
20 procure their advertising services. And, you know --

21 MS. CLEMONS: Yes.

22 THE COURT: -- you can, you know, present all the,
23 you know, issues and this and that to Judge Brinkema and
24 she'll make a decision.

25 But, I mean, the idea that you are objecting and

1 answering subject to certain objections, and then, you know,
2 whether this, what seems to me to be a clear and accurate
3 statement that the FAA's practices for the agencies to
4 pay -- for the advertising agencies to pay Google, and, you
5 know, they then -- the agencies then reimburse the
6 advertising agencies is just, you know, a core fact that
7 then one then has to deal with, you know, is that a direct
8 purchaser or isn't that a direct purchase.

9 But my concern is that you're not being -- by
10 answering these same subject to objections and not having
11 that core fact, I think, out there and known so you can then
12 argue whether it's direct or not, it's a little bit of a
13 problem.

14 I mean, I read this as, you know, you're
15 acknowledging on behalf of the agencies that they use
16 advertising agencies to provide their services, and, you
17 know, you're not admitting that that doesn't mean it's a
18 direct purchaser, but that's just the process that is used,
19 and you still are entitled to get damages. They say no
20 you're not, it's an intermediary, you're not a direct
21 purchaser. Okay.

22 But that core fact I think you need to
23 acknowledge, and need to acknowledge that without any
24 objections. You understand what I'm meaning by that?

25 MS. CLEMONS: I do. I do understand what you

1 mean, Your Honor.

2 Our concern is really that they didn't ask for the
3 core fact. Right. There are all sorts of facts that go to
4 the indirect purchaser analysis and the direct purchaser
5 analysis, and they didn't ask that; they asked, did you
6 directly purchase, and they asked it in a bunch of different
7 ways, and so we simply tried to explain what we actually do.

8 And with respect to -- with respect to open web
9 display advertising versus advertising services, it's
10 complicated because the answer is yes or no depending on
11 what Google is defining that to mean.

12 So we're happy to answer these --

13 THE COURT: How does it ever become yes, that you
14 paid for them -- that the agency itself wrote a check for
15 it? I mean, any -- any transaction -- monetary transaction
16 on behalf of the agencies is made through the advertising
17 agencies; is that right?

18 MS. CLEMONS: Yes, Your Honor. Some cases --

19 THE COURT: You're not aware of any -- any
20 relationship in which the government then transfers funds to
21 Google for advertising agencies without the use of -- or
22 without going through their advertising agency; is that
23 right or not right?

24 MS. CLEMONS: Yes, Your Honor.

25 THE COURT: Okay.

1 MS. CLEMONS: But we are aware of situations, for
2 example, where the federal agency provides funds upfront for
3 the advertising agency to use. Right. The advertising
4 agency holds on to federal money and then spends it. Right.
5 So there are -- it's just a nuanced, complicated situation
6 that can't really be boiled down into, yes or no, did you
7 directly purchase.

8 THE COURT: Okay. Well, again, the confusion I
9 think comes up in that you're using the term that the FAAs
10 purchased directly from Google certain things.

11 Help me understand your -- you complain about them
12 using the term, and then you used the term. So help me
13 understand why it's okay for you to use it and not okay for
14 them, as opposed to the FAA's obtained services from Google
15 as opposed to purchased directly.

16 MS. CLEMONS: So because, Your Honor, a direct
17 purchase, that is a term of art in antitrust law. Right.
18 What is a direct purchase is a purchase that is sufficiently
19 direct under all of the case law that is pursuant to
20 *Illinois Brick*. Right. That confers antitrust standing
21 based on proximity. That, a direct purchase, is a very
22 complex issue of fact.

23 And so our contention is -- and has been or we
24 wouldn't have brought the case -- that we are, in fact,
25 direct purchasers of these services. One way in which --

1 and we argued this in opposition to their motion to dismiss.
2 One way in which we are direct purchasers is that our bids,
3 bids on our behalf, noted in Google's systems as being on
4 our behalf, right, go through Google's systems, and Google
5 takes its take rates directly from those bid amounts. They
6 don't separately, you know, bill out later, you know, to the
7 ad agency for sort of everything it did that month. Those
8 take rates are calculated and pulled from the bids of the
9 advertiser. And so there is nothing sitting in between
10 Google and the advertiser's earmarked bid. When Google
11 takes its take rate out, it's revenue share in the Ad
12 Exchange, for example.

13 And so that is one example of how there is a
14 direct connection between a bid owned by the federal agency
15 and Google whose services that federal agency is using and
16 who is taking its payment directly from the bid amount.

17 THE COURT: Okay. All right. I think I
18 understand the issues there. But let me just hear from
19 Ms. Goodman briefly on that issue and then ...

20 MS. GOODMAN: Thank you, Your Honor.

21 I want to make one factual clarification to what
22 Ms. Clemons said.

23 My understanding of how these transactions work
24 with the ad agencies, we have an FAA who contracts with an
25 advertising agency. In many, many, many instances, there

1 are further subcontractors who do the actual media buying.
2 Those further subcontractors sometimes use a third-party
3 competitor product of Google's who then go out into a Google
4 Ad Exchange. So I just wanted to make sure Your Honor
5 understood those -- that factual nuance.

6 Second, these interrogatories and RFAs do not call
7 for a legal conclusion. I spent yesterday thinking, is
8 there any other word I could use than direct to understand
9 the shortest point between two people on either side of a
10 transaction. I can't think of another word in the English
11 language that happens to have a legal meaning, which, I
12 agree, we can argue about before Judge Brinkema. But the
13 fact remains that "direct" means without something in
14 between it, without an intermediary. That's what the Oxford
15 English Dictionary says.

16 And so the answers, if there is no such direct
17 exchange, direct provision of dollars from Google to --
18 sorry. From an ad agency to Google, from the federal agency
19 advertisers to Google, that is a relevant fact, I agree, to
20 the direct purchaser analysis.

21 We think it's dispositive; the government does
22 not. We can argue about that -- the legal conclusions to be
23 drawn from that fact later, but I need -- I am entitled now
24 to the factual information, as we all understand the word
25 direct to mean, the shortest point between two people. And

1 the exchange of money for services, is that done directly,
2 or is that done through an intermediary? And the answers
3 that we are receiving do not squarely answer that question.
4 And I would again direct Your Honor to the *Kia* case, because
5 that case also discusses this question of whether the RFAs
6 call for a legal conclusion or not. And, in that case, they
7 talked about patentability of issues, and the Court held
8 that it did not call for a legal conclusion when clearly it
9 is an application of law -- a fact of law that is going to
10 have a legal significance, but we can -- and we can argue
11 about that later.

12 But I am just trying to understand the factual
13 situation, and I have heard from Ms. Clemons that there
14 are -- she is not aware of any purchase -- or any payment of
15 dollars from an FAA to Google, but I don't have that
16 anywhere in a sworn interrogatory response or in any other
17 sort of clearly stated written discovery response to which I
18 am entitled to present to Judge Brinkema to make this far
19 simpler for her when we come to argue summary judgment.

20 THE COURT: Okay. Well, I think -- and, again,
21 what I'm going to do with this is I'm going to require the
22 government to provide a response to you that is not subject
23 to any objections, that is consistent with the responses
24 that are embedded in responses that are subject to
25 objections and, in essence, that the FAA's practice is for

1 the FAA's agencies to pay Google.

2 And you all can argue whether, you know, the other
3 stuff is direct or not. I mean, that -- I've been on the
4 fence as to whether it is a legal conclusion or isn't a
5 legal conclusion. It is a term of art in the antitrust
6 world. It's not a term of art to everybody else who's
7 trying to read this in common sense. But, you know, the
8 parties are trying to protect their positions, and I can
9 respect that.

10 But I do think you're entitled to know the core
11 fact, and the core fact is that agency uses advertising
12 agency, advertising agency obtains services on behalf of the
13 agency and pays for them. And so that, I think, will be
14 clear with a supplementation as to that, so I'm not going to
15 require any further responses other than that indication
16 that that's the way that this works. So that's the way I'm
17 going to deal with the direct purchasers issues.

18 Now, this remaining issue about communications and
19 the timetable for it being I guess expanded upon, help me
20 understand why that is and why you think my earlier ruling
21 somehow or another makes this clear that I should be
22 granting it.

23 MS. GOODMAN: So Your Honor ruled that Google may
24 take a 30(b)(6) deposition of the Department of Justice,
25 part of which is to understand their communication. And one

1 of the topics that is fair game for that deposition is
2 communications between the Department of Justice and third
3 parties and the European Commission related to the subject
4 matter of this investigation and this action.

5 We know, for example, from public reporting that
6 there are communications continuing to go on between the
7 government and the European Commission. The European
8 Commission has its own similar investigation proceeding with
9 respect to the very same services here or issues at issue
10 here. And the government has decided to cut off those
11 communications at March of 2023, but that's sort of
12 precisely before we've seen public reporting about these
13 communications taking place. And to have these written
14 communications when the government has approached us and
15 said wouldn't it be easier for you to take this deposition
16 if you had something in writing, we -- we haven't further
17 discussed that with the government at this time, but they're
18 resisting providing the written discovery that they have
19 argued is what should be done in order to avoid invading
20 their work product.

21 So we're entitled to the written discovery
22 responses because we've timely served them and we've moved
23 to compel. And I would think that the government would have
24 to provide them to us precisely to avoid the situation that
25 they were so concerned about in our agreeing in the motion

1 for the protective order last week about invading their
2 attorney/client privilege or their work product. These
3 writings, these written communications, will aid in that
4 process.

5 THE COURT: Well, I mean, obviously the objection
6 talks about this March 27, 2023 date and agreements that
7 were reached and understandings.

8 Why does that not apply to these documents as
9 well?

10 MS. CLEMONS: So the understanding -- so discovery
11 is not a -- it's not -- there's not a rule of reciprocal
12 discovery that applies here.

13 THE COURT: Well --

14 MS. CLEMONS: Just because --

15 THE COURT: -- there can be. I mean, the parties
16 often agree that, you know, we're not going to be doing
17 privilege logs for dates from, you know, the day the lawsuit
18 was filed. That's reciprocal. If you agree to something,
19 you agree to something, and it goes for both sides.

20 So what --

21 MS. CLEMONS: The -- what I meant by that is just
22 because we have requested something doesn't mean that the --
23 that it always has to be a mirror image.

24 We have moved to compel. We have a deposition
25 that we need to take in an orderly manner, in an orderly

1 fashion that uses our three and a half hours under -- you
2 know, efficiently and without having to call Your Honor's
3 chambers to resolve privilege disputes or other things. And
4 these communications going through the date of our RFP,
5 which was August 25th, will aid in that process.

6 Understanding who the government is speaking to,
7 who is directly relevant to our arguments that this case was
8 brought in a biased manner that I understand we're now
9 permitted to have some limited amount of discovery into.

10 So having an understanding of who they are
11 communicating with is what we are hoping to achieve by
12 asking for this supplementation of RFP 44 and
13 Interrogatory 21 so that the deposition will go more
14 smoothly.

15 THE COURT: Well, what documents have you gotten
16 from what date range?

17 MS. CLEMONS: We have received communications
18 between the Department of Justice and third parties, I
19 believe going through January.

20 THE COURT: The filing of the lawsuit, is that
21 the --

22 MS. CLEMONS: Right. Right.

23 And I believe that they have supplemented that
24 response by providing their communications between
25 themselves and third parties with respect to subpoenas that

1 were served by the United States.

2 I haven't had the opportunity to review those yet,
3 but to the extent that there are communications that are not
4 about the subpoenas but that are ongoing and are not
5 privileged between the Department of Justice and third
6 parties about this lawsuit, that is what we're seeking to
7 discover, precisely so that we can avoid invading any work
8 product or attorney/client privileges when we take the
9 deposition.

10 THE COURT: Okay. Help me understand the time
11 frames of what we're talking about here.

12 You have produced documents through the filing of
13 the lawsuit relating to communications with European
14 Commissions and other third parties; is that right?

15 MS. GOODMAN: Yes, Your Honor. And we've actually
16 produced not just the filing of the lawsuit, but two months
17 after the March 27th date that was part of our reciprocal
18 agreement in negotiating discovery responses. And it
19 includes over 30,000 documents, these communications with
20 enforcers and with third parties. So it's not a small
21 amount of information.

22 The United States has also agreed to produce
23 communications with third-party industry participants
24 between March 27th and August 25th because Google, in sort
25 of a last-second surprise, decided to produce those as well.

1 So we are trying to produce those, and we sent out the first
2 production yesterday. So Google hasn't -- our position is
3 that Google hasn't explained specifically why it needs
4 additional documents beyond what we've agreed to produce.

5 And to be clear, Judge Brinkema just ruled this
6 morning that the issue of whether this case was brought in a
7 biased manner is off the table; she dismissed those
8 defenses. And so if that is their reason, it's not a reason
9 that is valid in this case any longer.

10 THE COURT: Well, it probably goes a little beyond
11 that, but I would say the case has already been brought
12 between the time that you produced documents and the
13 timetable that they're looking at there, but it does have
14 some modest impact from that angle, I assume. Okay. All
15 right. Thank you.

16 You know, I've looked at that. I think the
17 parties -- and again, you know, I -- I'm trying to
18 understand what is indicated in the various communications
19 relating to this issue, but I think the parties pretty much
20 have taken the position that, for whatever reason, that
21 March date was a date that the parties had agreed to. I
22 don't find that there's good cause to change that. I'm not
23 going to require any supplemental responses to either
24 Interrogatory 21 or Request for Production of Documents 44.
25 So I think that takes care of the motion to compel issues.

1 Thank you.

2 Now, turning to the other motion. I want to hear
3 first from Google's representative about this issue.

4 MS. ELMER: Good morning, Your Honor. Julie Elmer
5 for Google.

6 Your Honor, we are committed --

7 THE COURT: Well, first let me ask you -- I am
8 concerned about the way this issue has been presented to the
9 Court, and there's been no discussion about the law firms'
10 responsibilities in making certifications to the Court and
11 in dealing with this issue. There's a lot of discussion as
12 to what internal people at Google did or didn't do, and the
13 declaration talks about, you know, how it was an inadvertent
14 error or mistake, whatever. But law firms, being officers
15 of the Court, representing clients, have responsibilities to
16 make sure that things are done properly, and you can't off
17 source that to a client.

18 I want to hear what the law firms'
19 responsibilities have been in dealing and making sure that
20 these discovery issues were being addressed appropriately,
21 thoroughly by the client, because you're the one who's
22 representing the client in this court.

23 Is it your firm that's in charge of the discovery?

24 MS. ELMER: Yes, Your Honor.

25 THE COURT: Okay. So help me understand why I

1 haven't heard anything about what your law firm did to make
2 sure that these responses, that the document production was
3 being done properly, thoroughly and timely.

4 MS. ELMER: Your Honor, the breakdown occurred at
5 the place where the person within the company who was
6 running the search terms ran them over the litigation
7 ingestion sites. So those are the sites where the documents
8 that were collected for this litigation, the refresh
9 productions, the additional custodians that were added, the
10 additional search terms that were added for the refreshed
11 period and for those custodians. That was -- so that
12 representative ran the search terms over those and provided
13 us with hit counts, and those hit counts --

14 THE COURT: But you, the lawyer, have a
15 responsibility to make sure that the searches are being done
16 thoroughly. And I haven't heard anything yet or seen
17 anything where the law firm was involved in doing anything
18 on the front end. And, you know, it is difficult to
19 understand, given what I would have thought to Google that
20 this case would have been a fairly high priority for them
21 and a case in which they would be taking seriously, that
22 somehow or another, whoever they put in charge of running
23 search terms on ingestion sites runs them on two, but
24 doesn't run them on five. That is, one, that there's no
25 oversight internally for Google to make sure that who is

1 doing that knows what he or she needs to do, a check and
2 balance to make sure that it's done thoroughly on the
3 client's side; but even more importantly, on the lawyer's
4 side, because it's the lawyer who's representing the client
5 and is responsible ultimately for everything in this case.

6 So, again, help me understand what happened in
7 this regard and how those mistakes could have happened to
8 cause what is a very significant problem in this case.

9 MS. ELMER: The search term counts that were
10 reported to us from the client's in-house discovery team
11 were very large, and there were no reasons to suspect that
12 there were ingestion sites that were not searched. Outside
13 counsel was not aware of the existence of the other
14 ingestion sites.

15 We are -- we flagged the issue when we were
16 preparing for depositions and noticed that for a particular
17 deponent for whom a large number of documents had been
18 produced at the investigative phase, the hit counts for that
19 particular deponent were smaller than should be expected.
20 When we were preparing for a deposition, we flagged the
21 issue.

22 THE COURT: In the middle part of August -- you
23 know, substantial production was supposed to be done in
24 July. I assume you didn't start preparing witnesses or
25 talking to witnesses and looking at documents until mid

1 August. Is that when you really started preparing
2 witnesses?

3 MS. ELMER: Your Honor, the DOJ did not start
4 noticing depositions until late July, and depositions -- I
5 think this particular deponent's deposition was not -- the
6 notice did not issue until sometime in August, so it was a
7 very compressed time frame. All of the deposition notices
8 were flowing out in the late July and August time frame.
9 And so it was in getting down to that single deponent level
10 that red flags were raised.

11 The numbers that we're talking about here are so
12 big. You know, this matter flows from four years of
13 overlapping investigations, and the amount of material that
14 has been stored in these iterative collections over time is
15 massive. And, you know, there had been a review population
16 at the investigative phase.

17 It's not like there have been no documents that
18 were produced from the ingestion sites that we're here about
19 today. During the investigation phase, Google ran very, you
20 know, broad search terms over those documents, and that
21 related in a production of approximately 3 million documents
22 to the DOJ, and they have those documents.

23 Many of the litigation search terms are based on
24 those broad search terms. So there is a lot of overlap
25 between the documents that we're here about today. That's

1 why we're seeing very high deduplication rates as those
2 documents are being exported to the vendor and processed and
3 deduplicated.

4 THE COURT: Again, I'm not understanding how this
5 could happen with what should have been at least two levels
6 of oversight. One internal level that when someone's given
7 the responsibility to do this, that the person who is
8 assigning them that responsibility, make sure that person
9 knows all the avenues that has to be done. So just because
10 somebody came in and you're told to do this, you know,
11 management or someone who is assigning that job I think
12 would have the responsibility to make sure that you've got
13 to search A, B, C, D, E and F, not just A and B. There's no
14 explanation for that in the declaration.

15 MS. ELMER: I --

16 THE COURT: And then on top of that and again, at
17 least in my mind, very importantly, is the lawyers'
18 responsibility to make sure things are done right, and to
19 make sure that you have sufficient information to know what
20 document sources there are that -- and, you know, that these
21 search terms are being done on all the sources. And I
22 haven't heard a peep about what the law firm did to make
23 sure that things were done properly when apparently you
24 certified -- at least a lawyer from Google, as I understand
25 it, certified that substantial completion was done on

1 July 7th.

2 How -- what did you do in order to assure yourself
3 that substantial -- that substantial completion had been
4 done by them?

5 MS. ELMER: So, Your Honor, I mean obviously we
6 were basing the substantial completion on the documents that
7 we had in our review platform at that time, and it now has
8 turned out to be the case that there were ingestion sites
9 that were not searched. And that --

10 THE COURT: With 16 million documents; right?

11 MS. ELMER: So I want to be clear that the
12 16 million number represents search term hits. As those
13 documents are being loaded into the vendor's review
14 platform, processed and deduplicated, we're seeing a
15 deduplication rate as of today of 67.81 percent. So it is
16 not going to end up adding 16 million documents.

17 THE COURT: Okay. So one-third of 16 million is
18 5 million documents; right? Rough math. You produced how
19 many documents since the filing of this lawsuit? 1 million.
20 So you're talking about potentially five times what you've
21 produced, and you're saying you thought there was
22 substantial completion done? It's false. It wasn't; was
23 it?

24 MS. ELMER: Your Honor, I think there is not
25 perfect visibility into the internal processes. Each person

1 is playing a role in the litigation. We have outside
2 vendors, we have the internal discovery team, we have
3 outside counsel. We have had different outside counsel over
4 the course of the litigation and the investigations. This
5 has been going on for four years. It is -- there have been
6 a lot of iterations, a lot of new people that have come on,
7 people who have gone. It is a --

8 THE COURT: It's no excuse. And the lawyer is the
9 one -- the law firm is the one who's ultimately responsible
10 when you're representing someone in court. That's just the
11 way it is. I mean, you have the responsibility to make sure
12 the client does what the client is supposed to do,
13 particularly when you represent things to the Court. It's a
14 very difficult situation.

15 Tell me what the law firm has now done to make
16 sure that the client is being fully compliant with its
17 obligations to provide responsive documents in this case.

18 MS. ELMER: So what we have done is, we have
19 talked with all of the people who are involved in the
20 collection of documents at the client. We have -- the
21 client has conducted an analysis of -- to make sure that all
22 of the litigation search terms have been run across all of
23 the ad tech custodian's documents for the agreed time
24 period, and the law firm has double checked that analysis to
25 ensure that we've covered all of the places where unique

1 documents from these ad tech custodians are stored. And we
2 have brought on a new vendor to assist with reviewing the
3 documents more quickly, and we have started up a new
4 database, a duplicate database so that we can have more
5 reviewers in the documents reviewing at the same time so the
6 database doesn't crash when you have many hundreds of
7 reviewers in them.

8 And so those are some of the steps that we have
9 taken to make sure that this problem will be addressed and
10 that the documents will be produced to plaintiffs quickly.

11 We have focused on, you know, determining the
12 first cause, the direct cause. We have that. Will there be
13 more postmortem and, you know, thinking about how we can
14 improve, you know, best processes? Yes. But our focus, our
15 Number 1 priority has been on, you know, assessing the size
16 of the issue and then getting the documents produced to the
17 plaintiffs as quickly as possible.

18 THE COURT: Well, it's not rocket science. You've
19 got six, seven ingestion sites. You have to run the search
20 terms on those ingestion sites. I mean, postmortem isn't
21 going to be that difficult. It's, you know, we have
22 documents stored, we've got to do what we need to do on all
23 the sites.

24 I mean, that's why this inadvertent, honest,
25 whatever, is hard to understand those adjectives being used

1 in something like that. Maybe it wasn't malicious, maybe it
2 wasn't in bad faith, but it clearly was not being done under
3 proper supervision, either internally or externally. And
4 you've put everyone in an unfortunate situation by your
5 failure to do that.

6 Tell me, as of right now, what is the status?

7 MS. ELMER: So the status is that as of right now,
8 we have gotten the universe of documents that are impacted.
9 The documents are being exported to the vendor and
10 deduplicated. The vendor has determined that --

11 THE COURT: Well, let's take it step by step.

12 MS. ELMER: Okay.

13 THE COURT: How have you determined that you now
14 have the universe of documents?

15 MS. ELMER: As I've stated earlier, the client has
16 performed an analysis where we're looking at each, you
17 know -- here is the date range for Custodian A. Have we
18 accounted for all of Custodian A's documents for the full
19 date range over these ingestion sites? Are all of the
20 unique documents that cover those date ranges for that
21 custodian encompassed within the ingestion sites -- the
22 eight ingestion sites that we've described in the
23 declaration? And then outside counsel has checked that
24 analysis, and so we have, you know, the client checking the
25 internal, and then we have the external check. And we

1 completed that analysis on Wednesday.

2 And then now the documents are being exported to
3 the vendor. The vendor is in the process of deduplicating.
4 They have deduplicated more than half with a dedupe rate of
5 67.81 percent. So far 3 million documents -- 3.1 --
6 approximately 3.1 have been added to the review population.
7 So you can see that those numbers come down. I concede that
8 they are still large, but they have come down dramatically.

9 And we've proposed what I think is a realistic
10 modification to the schedule. We are committed to meeting
11 that date of November 8th. We will ramp up the resources in
12 whatever way needs to be done, but it is not technologically
13 feasible as a practical matter for us to be able to get the
14 documents all produced -- reviewed, produced, processed to
15 plaintiffs by September the 29th, as they've asked for in
16 their reply.

17 THE COURT: Why not?

18 MS. ELMER: The main issue is simply machine --

19 THE COURT: You've known about this for a month
20 now. You knew about it starting on August 18th. You knew
21 there was a real issue. There didn't seem to be a call to
22 arms then. The first time I heard about it was September 1,
23 and it was this, you know, like, whoops, we've got a
24 problem. It wasn't as clear as I now know how egregious
25 this is. But, you know, you don't just get a do-over. It

1 seems to be what you're thinking you're entitled to do.

2 MS. ELMER: Your Honor, we do not feel that we're
3 entitled to a do-over. We understand and appreciate the
4 gravity of the mistake. It was absolutely not intentional.
5 We do think we can get the case back on track by committing
6 to this deadline, and I think we have a good plan in place
7 to do so.

8 And, you know, you asked why the documents
9 couldn't be produced by the 29th. You know, the reason it
10 has taken the company so long to, you know, provide details
11 about this issue is it has taken that long to really
12 understand the scope of the issue, the cause of the issue.
13 We have investigated the cause of the issue, and we are --
14 and who it impacts. At first it appeared that it might just
15 impact a deponent and then more deponents. We were focused
16 on the depositions at the time. Then it became clear, no,
17 no, it affects a broader set of custodians, and we brought
18 it to the attention of the plaintiffs and the Court as soon
19 as we had enough information to provide some sort of
20 reliable description of what was happening.

21 And, you know, plaintiffs in their brief have
22 complained when a number that we've provided ends up
23 changing. That's because we're erring on the side of
24 transparency, and we're providing updates in real time as we
25 have them, even though our work is still continuing. And,

1 yes, those numbers are going to continue to change as we
2 check and double-check the work to make sure that it is
3 accurate and that it is nailed down.

4 I can assure you that the client and outside
5 counsel have people who are working literally full bore,
6 seven days a week to correct this issue. It is our Number 1
7 priority. It is my Number 1 priority.

8 THE COURT: So you've indicated that there are
9 3.1 million documents that have currently gone through the
10 deduplication phase; is that right?

11 MS. ELMER: That's correct.

12 THE COURT: And what does that mean, they've gone
13 through the deduplication phase?

14 MS. ELMER: That means they're ready to go to the
15 review platform for review for relevance --

16 THE COURT: Okay.

17 MS. ELMER: -- and privilege.

18 Those documents are reviewed, and then the result
19 is produced to the plaintiffs.

20 THE COURT: So the deduplication takes care of any
21 documents that have already been produced in the case?

22 MS. ELMER: That is correct.

23 THE COURT: Okay.

24 MS. ELMER: And only exact duplicates are
25 deduplicated.

1 THE COURT: And if those numbers hold up, there
2 are going to end up being 6 million documents that need to
3 be reviewed? So it's about half?

4 MS. ELMER: That is our best estimate at this
5 time.

6 THE COURT: Give me a ballpark of the million
7 documents that you did produce, what percentage of that came
8 from the review -- so how many documents did you end up
9 going through the review process that ended up being
10 produced in a million? Was it half? A third? Whatever.

11 MS. ELMER: The responsiveness rate on average has
12 been around 25 percent. So if you have -- yeah, just do the
13 math. I think we had a similar population. Roughly similar
14 population.

15 THE COURT: Roughly similar to what?

16 MS. ELMER: To the 6 million that we're talking
17 about right now.

18 THE COURT: Well, 25 percent of 6 million is a lot
19 more than a million documents.

20 MS. ELMER: Okay. 20.

21 THE COURT: I mean, I'm just trying to understand.
22 You're the one who seems to know the numbers; I'm just
23 trying to do the math.

24 MS. ELMER: Yeah. So as the declaration states,
25 the hit counts that were pulled from the litigation search

1 terms being run over the litigation ingestion sites resulted
2 in a population of 5.87 million documents that were loaded
3 onto the review platform; so ...

4 THE COURT: Okay. How many documents have you
5 produced from --

6 MS. ELMER: From the set?

7 THE COURT: -- in the last 14 days?

8 MS. ELMER: I don't know the answer to that, Your
9 Honor. My understanding is that so far, about 52,000
10 documents have been produced from these other ingestion
11 sites, but that was before we've added another team of
12 reviewers. We've added over 200 reviewers to start moving
13 this process more quickly. And we were still waiting for
14 documents to be loaded onto the review platform. That does
15 take machine time, both on Google's side, you know, from
16 exporting the documents to their vendor, and then there's
17 machine time at the vendor to actually process the documents
18 and deduplicate the documents.

19 THE COURT: Okay. I don't have any further
20 questions.

21 Let me hear from Ms. Wood.

22 MS. ELMER: Thank you, Your Honor.

23 MS. WOOD: Your Honor, if I might just start with
24 my own question for counsel.

25 The 5.87 million from the previous review, was

1 that a deduped number, or was that after deduping?

2 MS. ELMER: That was after deduplication had been
3 applied.

4 MS. WOOD: Okay. Your Honor, as you know, the
5 words on the front of this courthouse read: Justice
6 Delayed, Justice Denied.

7 We are very deeply concerned about this discovery
8 failure, and also, as we noted in our papers, very deeply
9 concerned that this is not the first time that this has
10 happened where this exact defendant has found itself
11 producing material numbers of documents after the close of
12 fact discovery. And, indeed, this is a situation where,
13 back in May, we asked the question, are you sure everything
14 is okay with respect to document issues and collection and
15 review of documents in this case. Because we hear from the
16 case that is happening across the river in the *Search*
17 litigation that there are serious problems. Can you assure
18 us that we're not going to see those problems here. And we
19 were told all's well; we're fine.

20 To us, that degree of repeated recidivism in terms
21 of failure to take basic precautions to ensure that
22 documents are produced merits very significant consequences.
23 We are not yet in a position on behalf of the United States
24 to articulate the precise scope of those requested
25 consequences, but we are very concerned that the case get

1 back on track as quickly as possible so that justice does
2 not continue to be delayed and denied.

3 We have made what we believe to be an entirely
4 appropriate and conservative request to this Court for a
5 modicum of relief to address -- or to begin to address the
6 prejudice we have suffered by defendant's failure.

7 We believe that those requests are appropriate and
8 fully justified by what has occurred. And, again, once we
9 have more information about the very questions Your Honor
10 has been asking, how it can be that one individual at a
11 company of this size can make a mistake of this significance
12 and gravity without any supervision, either internally or
13 externally, those are precisely the questions that we have,
14 Your Honor, and only once we get answers to those questions
15 do we feel that we are in a position to assess the full
16 scope of relevant consequences.

17 But we would seek, as we've asked in our motion --
18 they have indicated that they are capable of hiring hundreds
19 of contract attorneys to review these materials. They are
20 one of the largest financial defendants in the world, and
21 they can -- they have the resources to ramp up their review.

22 I think that what is disturbing to us is that they
23 would talk about their need for two months to review
24 documents for responsiveness, and then somehow assume in
25 30 days we are able to review all of those new documents,

1 decide who to depose, issue any additional written discovery
2 that is relevant based on those newly-produced documents,
3 and all turn around and do that in a matter of 30 days.
4 That is not a reasonable framework for moving forward. That
5 would be punishing the victim and not the perpetrator.

6 So, at the very least, we would ask that this
7 court give us a reasonable amount of time to review the
8 documents once they are produced, to give us the ability to
9 notice four additional depositions based on the complete
10 production, not a production that, as Your Honor noted, is
11 one sixth of -- or one fifth, perhaps, of the total universe
12 of documents.

13 THE COURT: Well, you've got 3 million documents
14 before this lawsuit got filed.

15 MS. WOOD: That is correct, Your Honor.

16 THE COURT: I mean, you got an additional million
17 documents now.

18 MS. WOOD: That is also correct. Which even two
19 together is less than half of what we expect to come.

20 THE COURT: Well, no. What you can expect to come
21 is about what you've got right now, if her numbers are
22 right, or maybe twice what you've got right now. And -- but
23 the -- I don't know why you think you get a do-over on
24 the -- and I agree with most of what you're asking for.

25 The four additional depositions is one that I

1 don't really understand. You've taken four, you'll be able
2 to retake them to the extent, I assume, you took them
3 initially because you thought that they were some of the
4 more important witnesses that you needed to get taken care
5 of. I don't think that's going to change. I don't think if
6 we turn back the clock and you had these other documents
7 that you wouldn't depose the four people that you deposed
8 right now. If you can convince me later, then maybe so.
9 But giving you carte blanche to redo four I think is a
10 little bit aggressive.

11 MS. WOOD: Well, Your Honor, I think you made
12 somewhat joking reference when we were last before you to
13 the fact that these deposition slots, these ten deposition
14 slots are viewed by both parties as, I think you used the
15 word, precious.

16 THE COURT: You all have used -- I mean, you keep
17 telling me how precious they are and how few there are.

18 MS. WOOD: There are very precious.

19 THE COURT: So --

20 MS. WOOD: And when you have a limited number, a
21 very precious limited number of depositions that you can
22 use, it matters if you have a complete document production
23 to base that difficult strategic choice on.

24 I can't promise you that we wouldn't have deposed
25 any of them, but I would be very surprised if those are

1 exactly the four that we would choose based on a document
2 population that is vastly different. And so -- and, again,
3 I think anything less than that and some appropriate
4 sanction is really just allowing this defendant to grant
5 itself a three- or four-month extension of the discovery
6 schedule with virtually no consequences.

7 It wants to have exactly the same amount of time
8 it had before, it wants to proceed on the same rules as
9 before, but just get a three- or four-month continuance.
10 Why wouldn't they do that in every case? How that
11 incentivizing them to stop this continual process they seem
12 to have of looking for documents after the close of fact
13 discovery and not before?

14 And so I think asking for four depositions to be
15 added to our limited set of ten is not an unreasonable
16 request when, A, the document population is different; and,
17 B, there has to be some consequence. And simply moving
18 dates on the calendar, they would have preferred to have a
19 later trial date to begin with, so that's certainly not a
20 consequence to them. So we think there needs to be an
21 appropriate consequence. We haven't fully --

22 THE COURT: Well, we're not talking about
23 penalties here. And, you know, you've reserved your right
24 to come back. And I'm not going to make them do depositions
25 as a penalty. The only reason I'm dealing with this issue

1 right now is to try and get this case back on track and to
2 establish what is necessary, not what is a penalty.

3 MS. WOOD: Understood, Your Honor.

4 THE COURT: I don't want you to be misinterpreting
5 what I'm saying, but, you know, we're dealing with the
6 we-need-to-get-the-case-back-on-track issues right now.

7 MS. WOOD: Agreed, Your Honor. And that's why we
8 brought this motion on our own initiative, you know, last
9 week to make sure it would be heard today because we very
10 much want this case back on track. But we do think it would
11 be an equitable resolution given the fact that those four
12 deposition slots were strategically chosen based on an
13 incomplete data set that we be at least allowed the
14 opportunity to come back and apply to the Court for
15 additional depositions based on the newly-produced
16 documents.

17 THE COURT: Okay.

18 MS. WOOD: As well as the other relief we've
19 identified in our motion.

20 THE COURT: All right. Thank you.

21 Well, I spent a lot of time reading through this
22 trying to figure out with calendars and other things, and,
23 you know, I will say the Court shares the plaintiffs' desire
24 to get this case back on track, both on my floor and upper
25 floors. And, you know, as painful as it is to have to

1 extend time periods in this court, given what I consider to
2 be the failure on behalf of Google to comply with its
3 responsibilities in this case, both attorneys and client,
4 I'm required to do that.

5 But, you know, I -- and I understand this is going
6 to be a tough road for Google, but it's a road of their own
7 making, honestly, and they're going to need to make sure
8 that there are no slipups on this, and that they do what I
9 tell them they need to do, or the consequences could be
10 serious. And so I'm going to set out a few things.

11 First, I just want to talk about some of the broad
12 structure, and then I'll talk about dates. I think I'll
13 know -- as far as the items that were outlined, I think in
14 the government's motion, I think clearly to the extent that
15 documents are being produced that -- after September 8th, so
16 after the discovery cutoff date, that relate to any of the
17 four Google witnesses that have currently been deposed, so
18 there are documents that are being produced that relate to
19 those witnesses, I'll allow you to reopen those depositions,
20 but for a period of two hours. I think some sort of time
21 period is appropriate. Two hours is probably right. Not
22 that it matters much, but I think Google needs to pay the
23 costs of reopening that deposition to the extent that there
24 are any appearance fees for court reporters or videographers
25 for that. There shouldn't be an additional cost to the

1 government for having to reopen a deposition for Google's
2 failure to provide documents in a timely manner.

3 The request to have the government redesignate any
4 of the five remaining, you know, I think Google hasn't had
5 any objection to that. I think that certainly is
6 appropriate under the circumstances that you can pick
7 another card out of the deck, so to speak, for those five
8 and put one back into the deck if you need to.

9 At this point, you know, I'm not saying no to you
10 being able to pick one or two or whatever that you think may
11 be necessary, but you're going to have to come back and ask
12 me for it and show me why, as opposed to just giving you a
13 number now. It may be that once the situation gets in, you
14 know, that can be an agreed order or not. And, if not,
15 obviously you all know how to be here on a Friday, so we'll
16 be able to deal with that fairly quickly. But, at this
17 point, I'm not going to grant you carte blanche another
18 four.

19 I think -- and, again, I've kind of expressed that
20 before. I think you probably were pretty judicious in
21 picking those four, and while you may not have gotten
22 everything you've wanted out of those four, you've probably
23 gotten some very useful information. And, again, if you
24 need to redepose them at some point in time, that probably
25 would diminish my desire to give you additional depositions,

1 if you know what I mean. If they were important enough for
2 you to depose and redepose them, it's probably unlikely
3 you're going to get another go-around with another person.

4 For Google employees -- and I don't know whether
5 the ones that you're noticing are or are not currently
6 Google employees, but to the extent that they are Google
7 employees, you know, the ten business days notice of them
8 being here in Virginia is appropriate. You've got to do
9 what you've got to do. You know, this is -- and certainly
10 for Google employees, I think they can find a way to get
11 that done.

12 If they're not Google employees, you all need to
13 talk about the parameters of doing that and whether they're
14 still under some sort of agreements, cooperation or
15 whatever, but -- and to the extent that shortened time
16 period affects the, you know, MDL proceeding, they're going
17 to have to live with it. Sorry. But, you know, the MDL
18 plaintiffs there, if we want to redesignate a -- whatever
19 they need to do under a coordination order, they need to do
20 that. I know there was typically some extended period of
21 time there, but we need to keep this case on track, and
22 that's the only way I can see doing that is to give the ten
23 business days notice.

24 I am also going to require counsel to provide a
25 written verification five days before the deposition, as

1 requested by the plaintiff, that the deponent's documents
2 have been reviewed, produced, whatever. So I don't want
3 this happening again, but I want verification from counsel.
4 And they better not just make that verification based on
5 what somebody at Google told them. You need to make sure
6 that you have some independent justification for making a
7 verification. So it's not just did you; it's are you sure?
8 What did you do? You know, some independent oversight
9 there.

10 I am not extending fact discovery. I just -- and
11 to the extent that anyone thinks this is what we're doing,
12 we're not doing it. I am carving out things that can be
13 done that relate to factual discovery in this case. So to
14 the extent that anyone thinks that they get permission to
15 serve third-party subpoenas or anything like that, you know,
16 that time has come and gone absent a specific order from the
17 Court. So fact discovery is not extended in any period of
18 time. Google may not do any new discovery in this case. To
19 the extent discovery that was served, they can follow
20 through with the discovery that was served in an appropriate
21 manner.

22 The depositions that we will be taking -- that the
23 United States will be taking going forward, you know, can be
24 designated as having been taken prior to September -- I've
25 been doing that in some other instances, but I think just

1 for the sake of clarity and the need, if, you know, you do a
2 deposition in the November time frame, that deposition can
3 be used for the purposes as if it had been taken prior to
4 the September 8th date.

5 I'm going to defer ruling, as I did on the
6 additional depositions, on the need for any other
7 interrogatories or request for admissions. You know, I
8 don't know whether you're going to need them. We'll have to
9 see how many documents there are, how relevant the documents
10 are, whether they're, you know, of any real significance or
11 not. But I'm open to doing that. Obviously if there are
12 interrogatories or requests for admissions, I'm likely to
13 shorten the time period for responding from 30 to 15. So
14 there would be objections and responses due within 15 days
15 if I agree to allow any additional interrogatories or
16 request for admissions. And the same goes for if there
17 is -- if you can show cause for the need to do any
18 third-party discovery, you can present that to me, and I
19 will consider it.

20 Okay. So the timetable that I have come up with
21 is somewhat consistent with what was suggested by the
22 government with one or two little tweaks there. I'm going
23 to require that Google complete its document production no
24 later than October 6th. Whatever it takes needs to be done,
25 but it's got to be done by October 6th.

1 I want you to provide and file with the Court a
2 weekly status report as to -- you know, starting today, so I
3 want it here today. And part of this you've provided to me
4 orally, but I want it in writing in the file so everyone can
5 see as to what the status of the review process is, the
6 number of documents that have been produced that week. And
7 for this one, I want to know the number of documents that
8 have been produced since September 8th to now to be after
9 the close of fact discovery to date. And I want that filed
10 every Friday so that I can keep track of how this process is
11 going.

12 I want to make it clear, this is not going to be
13 you produce them all on October 6th. And that's why I want
14 to monitor this, because, you know, you need to produce them
15 as they are ready to be produced. And this is not a slow
16 rolling production; this is as soon as they're ready, you
17 need to get them out the door. And, you know, whether it's
18 daily, every other day, whatever, I don't know. But I don't
19 want you waiting and then sending big batches of them,
20 because they need to start looking at them and provide them
21 with enough information to use them in an appropriate
22 manner.

23 I'm going to extend the time period for the
24 plaintiff to conduct depositions in this case to
25 November 17. I've shortened the time period between the

1 documents and now, but I'm going to be making sure you're
2 getting documents consistently between now and October 6th.
3 So it's not like you can only have a week or 30 days to do
4 something. So you'll have plenty of time to do that.

5 Again, part of that is that, you know, the
6 government has spent three years investigating this before
7 it filed its lawsuit. It knows this case, it knows most of
8 what's going on in this case. I understand you don't know
9 what you don't have, information, and that's why I'm trying
10 to be fair in that regard, and I want to give you the
11 opportunity to do that. But I do think that the depositions
12 that we have discussed and any other things that I may allow
13 individually, other than the depositions that we've already
14 talked about, all that's going to need to be done by
15 November 17th. Okay.

16 I'm going to adopt the expert report timetable
17 that was proposed. The plaintiffs' expert reports are going
18 to be due on December 22nd. Defendant's expert reports on
19 January 23rd. Rebuttal reports on February 13. And expert
20 depositions will need to be done by March 8th of 2024. This
21 is, in essence, you know, basically a two-month change in
22 most of these dates. Unfortunate, but I think probably
23 necessary under the facts and circumstances.

24 I'm going to go ahead and tentatively set a status
25 conference for you all with Judge Brinkema on March 15th,

1 it's a Friday, at 10:00. We'll see what her calendar is,
2 but I figured the Ides of March would be a good day for the
3 parties to have to come in and see Judge Brinkema, and it's
4 also the Friday after the experts are done.

5 So I'll enter an order today that will reflect the
6 changes in the dates that I have just discussed there. I'll
7 leave up to you all to deal with the details as to
8 redesignating the depositions and those kinds of things.
9 But the order will be, you know, granting the government's
10 motion in part for that and then outline the dates, that you
11 all have that in the record.

12 Any other questions at this time?

13 MS. WOOD: I just want to raise one point, and I
14 don't think it will be a problem, and we'll do our very
15 best. But it is a shorter period of time, and I just wanted
16 the Court to be aware that from the moment the document
17 leaves Google and comes to us, the technological process
18 with productions of this size are that it can be up to a
19 week for it to get loaded on our system and reviewed.

20 So we're going to do our absolute best to meet
21 that November 17th time frame, but to the extent you've
22 carved a week out of that, I just feel like I would be
23 remiss if I didn't explain that I -- I'm a little bit
24 concerned. We will do our best to meet it. If we feel we
25 can't, we will obviously come back to the Court.

1 THE COURT: Well, let's hope we don't have to deal
2 with that issue. Hopefully you can start talking to IT
3 people to cut that --

4 MS. WOOD: Oh, we have.

5 THE COURT: -- one week down to a lesser period of
6 time.

7 MS. WOOD: We have. Unfortunately, we are not the
8 only case that the Antitrust Division has, but we have been
9 in extensive communication with our IT folks, and we're
10 doing everything we can in that regard, Your Honor.

11 THE COURT: Okay. Thank you. Mr. Reilly.

12 MR. REILLY: Yes, Your Honor. It's probably lost
13 in all the paperwork going back and forth. The parties had
14 submitted a joint motion to complete certain third-party
15 productions on a schedule specified in the proposed order.
16 This is Document Number 414.

17 THE COURT: And it was filed on Monday; is that
18 right?

19 MR. REILLY: I think it was filed on the 8th, Your
20 Honor. And it's possibly just lost in all of what was going
21 on.

22 THE COURT: Well --

23 MR. REILLY: I just wanted to bring it to your
24 attention, Your Honor. Thank you.

25 THE COURT: I saw it in the footnote of your

1 brief. We'll look at it. It's not necessarily drive-by
2 service here, you know.

3 MR. REILLY: Understood.

4 THE COURT: You know, I just -- you need to
5 understand that this is not my only case, and it has taken a
6 lot of time and attention, so I will try and look at that
7 and deal with it.

8 MR. REILLY: Thank you, Your Honor.

9 THE COURT: Okay. Anything else?

10 MS. WOOD: Your Honor, I'll just raise that at the
11 end of this conference in front of Judge Brinkema, there was
12 one issue that she did defer to you. I think we should have
13 an opportunity to meet and confer with counsel to see if we
14 can resolve it without the need to bring it to your
15 attention, but I just wanted to make you aware of that.

16 THE COURT: Okay. Well, I've not been alerted to
17 that, but I will hopefully hear that that isn't an issue.
18 If it is, I'll deal with it at the appropriate time.

19 MS. WOOD: That's our hope as well, Your Honor.

20 THE COURT: Okay. Thank you. I thank everyone
21 for their patience. Court will be adjourned.

22 (Proceedings adjourned at 12:52 p.m.)
23
24
25

I certify that the foregoing is a true and accurate
transcription of my stenographic notes.

Stephanie Austin

Stephanie M. Austin, RPR, CRR